Case No. 91-8685

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

TERRY LYNN STINSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

AMICUS CURIAE BRIEF

OF THE

FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

IN SUPPORT OF PETITIONER

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A. QUESTION(S) PRESENTED

What legal weight should be given by the Courts of the United States to the policy statements and commentary to the United States Sentencing Guidelines?

B. PARTIES TO THE PROCEEDINGS[1]

The identities of the parties are stated in the style of the case.

[1]The Florida Association of Criminal Defense Lawyers is a statewide organization with over one thousand members. The FACDL has a standing Amicus Curiae and Lawyer Support Committee of which the undersigned is chairman. The Petitioner and counsel of record for Petitioner have personally requested the participation of the FACDL in this case, and the Board of Directors has specifically approved the representation. The case otherwise meets internal criteria for FACDL participation. Opposing counsel has been consulted and does not oppose the appearance of amicus.

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

1. Table of Contents

2. Table of Authorities

a. Cases

b. Statutes

c. Other

D. CITATIONS TO THE OPINION(S) AND JUDGMENT(S) BELOW

United States v. Stinson, 943 F.2d 1268, *rehearing denied*, 957 F.2d 813 (11th Cir. 1992).

E. STATEMENT OF JURISDICTION

1. Citation to Statutory Provision

Jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. § 1254(1).

2. Time Factors

The judgment of the Court of Appeals became final on denial of rehearing on 20 March 1992. The Petition for Writ of Certiorari was timely filed by Petitioner on 18 June 1992.

F. CONSTITUTIONAL OR STATUTORY PROVISIONS

18 U.S.C. § 3553(a)(5)

any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced.

18 U.S.C. § 3553(b)

(b) Application of guidelines in imposing a sentence.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. *In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.* In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by

guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

G. STATEMENT OF THE CASE

Amicus curiae accepts the Statement of the Case advanced by counsel of record for the Petitioner.

H. SUMMARY OF THE ARGUMENT

In *Williams v. United States*, --- U.S. ---, 112 S. Ct. 1112, 1118 (1992), the majority noted that the dissent would draw a distinction between the "actual" guidelines and the policy statements that "interpret[]" and "explain[]" them. While the majority never actually said exactly what the policy statements were, they noted that policy statements were distinct from the guidelines, but that the guidelines were not unaffected by the policy statements. It is, respectfully, the position of amicus that the distinction between the Guidelines and the policy statements is one without a difference. As

noted by the majority in *Williams* where an error in interpreting a policy statement leads to an incorrect determination of the appropriate sentence, the resulting sentence is one which was "imposed as a result of an incorrect application of the Sentencing Guidelines" within the meaning of 18 U.S.C. § 3742(f)(1).

I. ARGUMENT

Misapplication of a Directive Policy Statement of the United States Sentencing Guidelines Will Result in an Incorrect Application of the Sentencing Guidelines Within the Meaning of 18 U.S.C. § 3742(f)(1).

Congress has made it clear that sentencing guidelines policy statements are to be taken seriously. The statutes defining the Sentencing Guidelines Commission's duties authorize it to promulgate guidelines and general policy statements. 28 U.S.C. § 994(a)(1), (2) and (3) (1988). 18 U.S.C. § 3553 (1988) requires in a number of passages that the sentencing court consider the policy statements in imposing a sentence. The court shall consider both "the kinds of sentence and the sentencing range" set forth in the guidelines, 18 U.S.C. § 3553(a)(4) (1988), and "any pertinent policy statement issued by the Sentencing Commission...." 18 U.S.C. § 3553(a)(5). The same statute provides that a sentence shall be imposed under the

guidelines unless the sentencing court finds that an aggravating or mitigating circumstance has not been adequately taken into consideration by the Commission in formulating the guidelines, and in so determining "the court shall consider only the sentencing guidelines, *policy statements, and official commentary of the Sentencing Commission*" 18 U.S.C. § 3553(b) (emphasis added). In the absence of applicable guidelines the court shall consider the relationship of the sentence to guidelines sentences applicable to similar offenses and offenders "and to the applicable policy statements of the Sentencing Commission." 18 U.S.C. § 3553(b). *United States v. Kelly*, 956 F.2d 748, 753 (8th Cir. 1992).

Specific statutes require consideration of the guidelines. 18 U.S.C. § 3582(a) (1988) requires that the court "shall consider any pertinent policy statements" in determining whether to recommend an appropriate type of prison facility. The court may modify a term of

imprisonment upon motion by the Director of the Bureau of Prisons after considering the factors set forth in section 3553(a) (which includes policy statements) if it finds extraordinary and compelling reasons warrant a reduction and that such reduction is "consistent with applicable policy statements" of the Commission. 18 U.S.C. § 3582(c)(1)(A) (1988). If a sentencing range has been lowered by the Commission, the district court may reduce the term "if such reduction is consistent with applicable policy statements." 18 U.S.C. § 3582(c)(2) (1988). Further, the court may order conditions of supervised release "consistent with any pertinent policy statements" issued by the Commission. 18 U.S.C. § 3583(d)(3) (1988). *United States v. Kelly*, *supra*, 956 F.2d, at 753.

The cited statutes, with their frequent use of mandatory language, all evidence congressional intent that policy statements be considered and that the courts' actions be consistent with policy statements. While there is the

statutory requirement that amendments to the guidelines, but not to the policy statements, be submitted to Congress as part of the amendment process, *see* 28 U.S.C. § 994(p) (1988), *United States v. Stinson*, 957 F.2d 813, 815 (11th Cir. 1992), the Eighth Circuit does not believe that this provision undermines the authority elsewhere given to the policy statements. *United States v. Kelly*, *supra*, 956 F.2d, at 753.

In a discussion concerning 18 U.S.C. § 3742, which provides for appeal in the event a sentence is imposed "as a result of an incorrect application of the sentencing guidelines," S.Rep. No. 225, 98th Cong., 2d Sess. 167-68 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3350-51 (footnotes omitted), states:

> It should be noted that a sentence that is inconsistent with the sentencing guidelines is subject to appellate review, while one that is consistent with guidelines but inconsistent with the policy statements is not. This is not intended to undermine the value of the policy statements. It is, instead, a recognition that the policy statements may be more general in nature than the guidelines and thus more

> difficult to use in determining the right to appellate review. Nevertheless, the *sentencing judge is required to take the policy statements into account in deciding what sentence to impose and it is expected that the policy statements will be consulted at all stages of the criminal justice system, including the appellate courts*, in evaluating the appropriateness of the sentence and corrections program applied to a particular case. (emphasis added).

The excerpt confirms the idea that the distinction between policy statements and guidelines is a meaningful one. The statement indicates that it is the relative specificity and generality of the provisions that distinguishes material to be included in a policy statement from that to be included in guidelines. The Senate Report referring to policy statements is language of guidance, not of command, because the policy statements are not a code and are not meant to be applied as a code. But Congress' use of the word "consider" does not mean that the courts can reject the policy statements as they please, but shows that Congress anticipated that the more general material to be included in a policy statement would

frequently be of a nature to illuminate, though not necessarily determine, the proper outcome. *United States v. Kelly, supra*, 956 F.2d, at 754.

Other circuits have commented that the U.S.S.G.'s policy statements do not carry the same imperative as the guidelines themselves. *See, e.g., United States v. Blackstone*, 940 F.2d 877, 893 (3d Cir.) ("Chapter 7 policy statements are not 'guidelines.' Whereas guidelines are binding on the courts, policy statements are merely advisory."), *cert. denied*, --- U.S. ---, 112 S. Ct. 611, 116 L. Ed.2d 634 (1991); *United States v. Pharr*, 916 F.2d 129, 133 n.6 (3d Cir. 1990) ("We recognize that policy statements are not binding in the same way as the actual guidelines."), *cert. denied*, --- U.S. ---, 111 S. Ct. 2274, 114 L. Ed. 2d 725 (1991); *see also United States v. Oliver*, 931 F.2d 463, 465 (8th Cir. 1991) (noting, "there are no binding guidelines addressing the sentence for a violation of a condition of supervised release, only a policy statement about a court's

options in such a situation"); *United States v. Ayers*, 946 F.2d 1127, 1130 (5th Cir. 1991) (implying that policy statements are not binding).

Subsections of 18 U.S.C. § 3553 and of 18 U.S.C. § 3583 confirm that policy statements are to be treated differently than guidelines. *Compare* 18 U.S.C. § 3553(b), entitled "Application of guidelines in imposing a sentence" (The court *shall impose* a sentence of the kind, and within the range referred to ...") (emphasis added), *with* 18 U.S.C. § 3553(a)(5), entitled "Factors *to be considered* in imposing a sentence" ("any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a)(2) that is in effect on the date the defendant is sentenced") (emphasis added). In § 3583(e), Congress specifically recited that "[t]he court may, after *considering* the factors set forth in section ... [3553](a)(5)," terminate, extend, revoke, or modify a term of supervised release pursuant to the terms of this section. (emphasis added). But a discussion of the

question of whether the policy statements are "advisory rather than mandatory" is an unnecessary legal exercise. *Cf. United States v. Lee*, 957 F.2d 770 (10th Cir. 1992) (holding the policy statements regarding revocation of supervised release contained in Chapter 7 of the U.S.S.G. are advisory rather than mandatory.

While the guidelines are distinct from policy statements that is not to say that the meaning of the guidelines is unaffected by policy statements. *Williams v. United States*, --- U.S. ---, 112 S. Ct. 1112, 1119 (1992). Where a policy statement clarifies and gives affirmative direction to the application of a specific guideline, the statement is an authoritative guide to the meaning of the applicable guideline. An error in interpreting such a policy statement may lead to an incorrect determination that a departure was appropriate. In that event, the resulting sentence would be one that was "imposed as a result of an incorrect application of the sentencing guidelines" within the

meaning of § 3742(f)(1). Similarly, an erroneous calculation under the Sentencing Table, from which all Guidelines sentencing ranges are derived, could properly be reviewed as an "incorrect application of the sentencing guidelines" under § 3742(f)(1) even though the Table itself is not officially designated as a "guideline." *See* U.S.S.G., ch. 5, part A.

As the Eleventh Circuit noted, *United States v. Stinson*, 957 F.2d 813, 814 (11th Cir. 1992), below:

> The commission's amendment did not alter the actual text of § 4B1.2 [of the Sentencing Guidelines]; instead, it merely changed the commentary.

The text of § 4B1.2 U.S.S.G. was exactly the same in October 1989, when Petitioner Stinson committed his offense, as when reviewed on appeal. The Eleventh Circuit thought it "crucial to examine closely the appropriate weight to be afforded the commentary." *Id.* To take such an approach, however, runs afoul of the majority's position in *Williams v. United States*, --- U.S. ---, 112 S. Ct. 1119

(1992). While guidelines are distinct from policy statements, when the guidelines do not change, as below, but the policy statement does change, an obvious and different interpretation of the existing guideline must be in order. While the Eleventh Circuit may refuse to be bound by changes in the commentary until Congress amends the guidelines to exclude specifically the possession of a firearm by a felon, *United States v. Stinson*, 957 F.2d, at 815, the Eleventh Circuit is still under the mandate of the guideline which has not changed and which has been approved by Congress. The only change has been a commentary or explanation of the *correct* application of the Sentencing Guideline. In this case, the correct interpretation of the Guideline runs afoul of precedent of the Eleventh Circuit (and other circuits). *See United States v. Stinson*, 943 F.2d 1268 (11th Cir. 1991); *United States v. O'Neal*, 937 F.2d 1369 (9th Cir. 1990); *see also United States v. Alvarez*, 914 F.2d 915 (7th Cir. 1990) (applying a "facts of the case" analysis for whether or not possession of

a firearm by a felon is a crime of violence); *United States v. Goodman*, 914 F.2d 696 (5th Cir. 1990) (same); *United States v. Williams*, 892 F.2d 296 (3rd Cir. 1989) (same). The legislative history expects that policy statements will be consulted at all stages of the criminal justice system, including the appellate courts, in evaluating the appropriateness of a sentence or corrections program applied to a particular case. The Eleventh Circuit by its position would opt out until Congress passes on the amendment or until the commission changes the text of the Guidelines. *United States v. Stinson*, *supra*, 957 F.2d, at 815 n.4. This holding is in effect saying that the meaning of the Guidelines is "unaffected by policy statements" and therefore does not follow *Williams*. In refusing to acknowledge the policy statement which clarifies an existing and adopted Guideline, the Eleventh Circuit has, in effect, approved a sentence which was imposed as a result of an incorrect application of the Sentencing Guidelines.

J. CONCLUSION

Policy statements issued by the Sentencing Commission do not fit neatly into any of the usual categories of legal authority. On the one hand, they warrant greater attention than does ordinary legislative history, because Congress specifically directed sentencing courts to consider the policy statements. By statutory mandate, "[t]he court, in determining the particular sentence to be imposed, shall consider ... any pertinent policy statement issued by the Sentencing Commission." 18 U.S.C. § 3553(a) (1988). Policy statements are approved by the Sentencing Commission as a whole, and Congress had the policy statements before it when it approved the Guidelines and amendments thereto. *See* United States Sentencing Commission, Sentencing Guidelines and Policy Statements (April 13, 1987); United States Sentencing Commission, 1990 Annual Report 1, 23.

On the other hand, as many courts have noted, policy

statements cannot be viewed as equivalent to the Guidelines themselves. *See*, *e.g.*, *United States v. Lee*, 957 F.2d 770, 772-73 (10th Cir. 1992) (policy statements are "advisory"); *United States v. Blackstone*, 940 F.2d 877, 893 (3rd Cir.) ("Whereas guidelines are binding on the courts, policy statements are merely advisory."), *cert. denied*, --- U.S. ---, 112 S. Ct. 611, 116 L. Ed. 2d 634 (1991). *Cf. United States v. Anderson*, 942 F.2d 606, 609-14 (9th Cir. 1991) (en banc) (Sentencing Commission's commentary must be treated as something more than legislative history but less than Guidelines).

Congress was careful to distinguish Guidelines from policy statements. *Compare* 28 U.S.C. § 994(a)(1) (1988) (Guidelines are "for use of a sentencing court in determining the sentence to be imposed in a criminal case.") *with* 28 U.S.C. § 994(a)(2) (1988) (Policy statements are instructions "regarding application of the guidelines or any other aspect of sentencing or sentence implementation."). As one judge

explained, Congress must have envisioned a difference between guidelines and policy statements or it would not have made the distinction." *United States v. Gutierrez*, 908 F.2d 349, 353 (Heaney, J., dissenting), *vacated by an equally divided court*, 917 F.2d 349 (8th Cir. 1990) (en banc). Only the Guidelines themselves need be submitted to Congress for approval, not the Commission's policy statements. 28 U.S.C. § 994(p) (1988). When the Commission submitted its initial Sentencing Guidelines to Congress in 1987, it submitted policy statements as well. *See* United States Sentencing Commission, Sentencing Guidelines and Policy Statements 5.26 (April 13, 1987). Nevertheless, the statute required only the Guidelines to be submitted, and the Second Circuit considered that distinction significant as an indication of the relative weight Congress would have the courts accord Guidelines and policy statements. *United States v. Johnson*, 964 F.2d 124 (2nd Cir. 1992).

While the legislative history clearly shows that a

sentence inconsistent with the Sentencing Guideline is subject to appellate review while one that is inconsistent with the policy statements is not, the analysis does not end. If the sentence on review is inconsistent with the specific directives of a policy statement, it is manifest that the sentencing court imposed a sentence as a result of an incorrect application of the Guidelines. Where, as here, the policy statement explicitly states what offense conduct should, or should not, be included in the Sentencing Guideline to be applied, and the sentencing court completely ignores the policy statement, an error in interpreting the policy has resulted. The error in interpreting the policy statement leads to the imposition of a sentence as a result of an incorrect application of the Sentencing Guideline. *See Williams v. United States*, --- U.S. ---, 112 S. Ct. 1118 (1992).

K. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Paul Larken
Assistant Deputy
Office of the Solicitor General
Tenth and Constitution Avenue
Washington, D.C. 20530

by ~~hand~~/mail delivery this 16th day of January, 1993.

Respectfully submitted,

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